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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

21 Cr. 217 (PGG)

5 STUART FINKELSTEIN,

6 Defendant.

Conference

7 -----x

8 New York, N.Y.
9 May 11, 2021
10 2:00 p.m.

11 Before:

12 HON. PAUL G. GARDEPHE,

13 District Judge

14 APPEARANCES

15 AUDREY STRAUSS

16 United States Attorney for the
17 Southern District of New York

RUSHMI BHASKARAN

17 Assistant United States Attorney

18 BRIAN J. GRIFFIN

19 Attorney for Defendant
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(In open court)

THE DEPUTY CLERK: United States of America v. Stuart Finkelstein.

Counsel for the government?

MS. BHASKARAN: Good afternoon, your Honor. Rushmi Bhaskaran for the government.

THE DEPUTY CLERK: Counsel for the defendant, please state your appearance.

MR. GRIFFIN: Good afternoon, your Honor. Brian Griffin for Mr. Finkelstein.

THE COURT: This matter is on my calendar for purposes of conducting a hearing as to whether defense counsel should be disqualified. I'm also going to conduct a *Curcio* hearing this afternoon.

The background is as follows: In a February 11th, 2020 letter, which is Docket No. 45, the government informed me that defense counsel, Brian Griffin has a potential conflict of interest. I scheduled a *Curcio* hearing for March 4th, 2020. Because of the pandemic, the hearing had to be postponed. It was then further postponed as the pandemic spread across the country and because of a need to conduct the hearing in person.

In its February 11th, 2020 letter, the government stated that the conflict was waivable for purposes of pretrial proceedings. But asked that the waiver, quote, "be limited only to pretrial proceedings or a pretrial resolution of the

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1 case," close quote. And that the issue, quote, "be re-examined
2 if the case proceeds to trial."

3 On May 4th, 2021, the government and defense counsel
4 submitted letters in which they stated the defendant has
5 rejected the government's plea offer and intends to proceed to
6 trial, citing Docket Nos. 43 and 44. The government now asks
7 that I, quote, "Consider whether disqualification of
8 Mr. Griffin is necessary at this time based on his status as a
9 potential sworn or unsworn witness and the likelihood that this
10 matter will proceed to trial," citing Docket No. 44 at Page 5.

11 The charges against the defendant and the government's
12 relevant factual allegations are as follows: The defendant is
13 the charged with mail fraud, aggravated identity theft, false
14 declarations before a court and obstruction of justice, citing
15 the indictment Docket No. 35. The defendant is an attorney
16 whose practice involves bringing actions of the Americans with
17 Disability Act, which I'll be referring to as the ADA, against
18 defendants who operate businesses that are allegedly not in
19 compliance with the ADA. The government charges that the
20 defendant stole the identities of two individuals in order to
21 file fraudulent lawsuits under the ADA in the United States
22 District Courts for the Southern District of Florida and the
23 Southern District of New York. The government alleges that in
24 early 2019 a newspaper article was published claiming that the
25 defendant was filing fraudulent ADA lawsuits on behalf of an

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1 individual identified as, quote, "victim two," close quote. At
2 about this time, the defendant retained Brian Griffin to
3 represent him, including in connection with fraud allegations
4 made in connection with lawsuits that the defendant had filed
5 on victim two's behalf, citing Docket No. 44 at Pages 1 through
6 2.

7 In February of 2019, one of the restaurants the
8 defendant had sued under the ADA -- an entity I will refer to
9 as, quote, "restaurant two," requested court intervention to
10 determine whether the lawsuit the defendant had filed against
11 it, a lawsuit that restaurant two had settled, was fraudulent.
12 The Court ordered the defendant and victim two to appear in
13 person for a hearing. In response, the defendant allegedly
14 directed Mr. Griffin to tell restaurant two's lawyer that
15 defendant would return some of the settlement money if
16 restaurant two withdrew its request for court intervention, at
17 Page 2.

18 The government further alleges that on April 30, 2019,
19 at the defendant's direction, Mr. Griffin transmitted certain
20 documents, including phone records, bank records and a
21 photograph to restaurant two's lawyer. According to the
22 government, Mr. Griffin represented to restaurant two's lawyer
23 that these documents established that victim two had authorized
24 the lawsuit against restaurant two. On the basis of these
25 representations, restaurant two's lawyer withdrew the request

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1 for a hearing, citing Docket No. 45 at Page 2.

2 The government does not contend that Mr. Griffin has
3 any criminal exposure. And there is no claim that the
4 documents Mr. Griffin provided to restaurant two's lawyer were
5 falsified. The government instead contends that these
6 governments tend to falsely suggest that victim two had
7 authorized the lawsuit against restaurant two. The government
8 sees Mr. Griffin merely as a conduit for information and
9 materials that the defendant directed him to supply to
10 restaurant two's lawyer, citing Docket No. 44 at Pages 2 and 4.
11 Finally, the government has not stated that Mr. Griffin is a
12 necessary witness at trial.

13 These facts and circumstances raise two issues. The
14 first is whether it's necessary to disqualify Mr. Griffin
15 because he will be an unsworn witness at trial. In the event
16 that Mr. Griffin is not disqualified, it is necessary for me to
17 conduct a *Curcio* hearing to make sure that Mr. Finkelstein
18 understands the risks and potential problems with proceeding
19 with Mr. Griffin as his counsel, given Mr. Griffin's contact
20 with restaurant two's lawyer and the role that evidence of
21 these contacts will play at trial.

22 I will first address the unsworn witness issue. The
23 government contends that Mr. Griffin's disqualification might
24 be necessary given that he was the conduit for information and
25 materials that the defendant caused to be provided to

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1 restaurant two's lawyer. Information and materials that the
2 government contends were provided in furtherance of the
3 defendant's alleged fraudulent scheme and in furtherance of
4 alleged obstruction of justice, citing the indictment, Docket
5 No. 35. According to the government, quote, "If Mr. Griffin
6 were to remain as lead trial counsel, he would be in the
7 position of cross-examining [restaurant two's lawyer] regarding
8 [their conversations] about resolving [restaurant two's
9 lawyer's] request for a hearing that could have exposed the
10 defendant's fraud," citing Docket No. 44 at Pages 4 to 5. The
11 government says that it would suffer unfair prejudice if
12 Mr. Griffin were permitted to act as an unsworn witness at
13 trial in this fashion.

14 Mr. Griffin responds that, quote, "There is no danger
15 that [he] would become an unsworn witness to any facts as to
16 which testimony might properly be elicited at trial." Because
17 his role in transmitting documents to restaurant two's lawyer
18 "does not lead to the conclusion that [he] has any firsthand
19 knowledge about the contents of those documents or of the
20 underlying relationship between Mr. Finkelstein and restaurant
21 two's lawyer," citing Docket No. 43 at Page 4. Mr. Griffin
22 further argues that the "transmission of documents to
23 [restaurant two's lawyer] alone is an immaterial fact" and that
24 "no relevant or admissible testimony on this point would be
25 properly elicited by calling counsel to the stand."

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1 As I noted a moment ago, the government has not stated
2 that Mr. Griffin is a necessary witness in trial. And it has
3 said repeatedly that there's no evidence that Mr. Griffin has
4 any criminal exposure here. Mr. Griffin does appear to have
5 firsthand knowledge of some of the events that may be presented
6 at trial, however. He spoke with restaurant two's lawyer about
7 the defendant's offer to return settlement money in order to
8 avoid a hearing that might have exposed defendant's fraud. And
9 he transmitted documents that purport to demonstrate that the
10 lawsuit against restaurant two was authorized by victim two.
11 Accordingly, absent a stipulation between the parties that
12 keeps Mr. Griffin's name out of the trial with respect to these
13 events, there is a risk that Mr. Griffin could become an
14 unsworn witness at trial. While the Sixth Amendment provides
15 that, quote, "in all criminal prosecutions the accused shall
16 enjoy the right to have the assistance of counsel for his
17 defense," citing United States Constitution Amendment Six, a
18 defendant "does not have an absolute right to counsel of [his]
19 own choosing," citing *United States v. Locasio*, 6 F.3d 924 at
20 931, Second Circuit 1993, which in turn cites *Wheat v. United*
21 *States*, 486 US 153 at 159 (1988). "Although a criminal
22 defendant can waive his Sixth Amendment rights in some
23 circumstances, that right to waiver is not absolute. Since
24 federal courts have an independent interest in ensuring that
25 criminal trials are conducted within the ethical standards of

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1 the profession and that legal proceedings appear fair to all
2 who observe them. The question of disqualification, therefore,
3 implicates not only the Sixth Amendment right of the accused,
4 but also the interests of the courts in preserving the
5 integrity of the process and the government's interest in
6 ensuring a just verdict and a fair trial," quoting *Wheat* 486 US
7 at 160.

8 Rules of professional conduct, as well as case law,
9 limit the circumstances in which an attorney acting in a
10 representative capacity may be a witness at trial, whether
11 sworn or unsworn. The Second Circuit has stated that, quote,
12 "When faced with an attorney as a sworn or unsworn witness, the
13 proper recourse is to disqualify the attorney, not to exclude
14 the testimony," *United States v. Kliti*, 156 F.3d 150 at 156,
15 Second Circuit 1998. New York rule of professional conduct
16 3.7(a) provides, and I quote, "A lawyer shall not act as an
17 advocate before a tribunal in a matter in which the lawyer is
18 likely to be a witness on a significant issue of fact unless:
19 One, the testimony relates solely to an uncontested issue; two,
20 the testimony relates solely to the nature and value of legal
21 services rendered in the matter; three, disqualification of the
22 lawyer would work substantial hardship on the client; four, the
23 testimony will relate solely to a matter of formality, there's
24 no reason to believe that substantial evidence will be offered
25 in opposition to the testimony; or five, the testimony is

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1 authorized by the tribunal," citing New York rule of
2 professional conduct 3.7(a). Even where a lawyer is not called
3 to testify, he or she may be required to withdraw
4 representation if the lawyer, quote, "is in a position to be an
5 [unsworn] witness." Citing *Locasio*, 6 F.3d 933, quote, "An
6 attorney acts as an unsworn witness when his relationship to
7 his client results in his having firsthand knowledge of the
8 events presented at trial." For example, "if counsel were to
9 cross-examine a witness as to her conversation with him, argue
10 the credibility of her testimony or suggest alternative
11 interpretations of her account of the conversation, he would
12 place himself in the position of an unsworn witness," citing
13 *United States v. McKeon*, 738 F.3d 26 at 35, Second Circuit
14 1984. Where an attorney acts as an unsworn witness, "His role
15 as advocate may give his client an unfair advantage because the
16 attorney can subtly impart to the jury his firsthand knowledge
17 of the events without having to swear an oath or be subject to
18 cross-examination. When an attorney is an unsworn witness the
19 detriment is to the government, since the defendant gains an
20 unfair advantage, and to the Court, since the fact finding
21 process is impaired. Waiver by the defendant is ineffective in
22 curing the impropriety in such situations, since he is not the
23 party prejudiced," citing *Locasio* 6 F.3d at 933 to 934.

24 Where an attorney has become inmeshed in his client's
25 alleged criminal acts, disqualification has sometimes resulted.

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1 See, for example, *United States v. Schlesinger*, 335 F.Supp.2d
2 379 at 382 (E.D.N.Y. 2004), disqualifying defense lawyer where
3 the government asserted that it would, "prove that the
4 defendant's alleged effort to defraud creditors was carried
5 forward by his use of [the attorney] to reverse a tax
6 assessment imposed by [the New York State Department of
7 Taxation and Finance]" and then "as a result [the attorney] may
8 become an unsworn witness or possibly a sworn witness because
9 of the [attorney's] unwitting participation in the alleged
10 fraud."

11 Also, *United States v. Kerik*, 531 F. Supp. 2d 610 at
12 616 (S.D.N.Y. 2008), disqualifying defense counsel where the
13 defendant was alleged to have "obstructed state investigation
14 through his lawyer's unwittingly made obstructive statements"
15 and where the attorney would "either be called as a government
16 witness or [would] necessarily be an unsworn witness before the
17 jury in the defendant's trial," close quote.

18 Also, *United States v. Napoli*, 2010 WL 1687669 at *5,
19 (E.D.N.Y. April 27th 2010), disqualifying defense counsel where
20 "the attorney's firsthand knowledge of the events in question
21 would lend specially and credibility to the arguments he makes
22 in Napoli's defense. And the jury may accept [the attorney's]
23 unsworn testimony about events precisely because he was present
24 for them."

25 Now, based on what I have been told about

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1 Mr. Griffin's contact with restaurant two's lawyer, it appears
2 to me that a stipulation could resolve the unsworn witness
3 problem identified by the government. The government has
4 represented that Mr. Griffin was merely a conduit for
5 information and materials provided by the defendant. And as I
6 have said, Mr. Griffin is not alleged to have participated in
7 any intentional wrongdoing. Mr. Griffin has also taken the
8 position that he was merely a conduit for information and
9 materials provided to restaurant two's lawyer.

10 As far as I can tell, it matters not whether
11 Mr. Griffin or some other lawyer passed this information and
12 materials on to restaurant two's lawyer. Accordingly, it seems
13 to me that the parties could reach a stipulation that the name
14 of the lawyer who passed on the information and materials to
15 restaurant two's lawyer could not be mentioned at trial.

16 I'm going to give the parties two weeks to determine
17 whether they can reach a stipulation as to this issue. I am
18 setting a relatively short deadline for that discussion between
19 the parties because this case has been delayed for more than a
20 year already, as a result of the conflict issue, and it is
21 necessary that the case move forward from here expeditiously.
22 Accordingly, within two weeks' time, the parties will submit a
23 joint letter to me stating whether they have been able to reach
24 a stipulation as to how the matter of Mr. Griffin's contact
25 with restaurant two's lawyer will be addressed at trial.

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1 Absent such a stipulation, I will have to revisit the issue of
2 whether Mr. Griffin's disqualification is necessary, applying
3 the case law I just referenced.

4 I will now turn to the conflict of interest issue.
5 Even if the parties reach a stipulation that Mr. Griffin will
6 not be identified as the lawyer who provided information and
7 materials to restaurant two's lawyer, that will not end the
8 matter. I am obligated under the law to make sure that
9 Mr. Finkelstein understands the potential problems and risks
10 associated with having Mr. Griffin as his counsel at trial,
11 given the factual circumstances that I have outlined. I will
12 begin with the law governing conflict of interest. As I noted
13 a moment ago, quote, "The Sixth Amendment guarantees that in
14 all criminal prosecutions the accused shall enjoy the right to
15 have the assistance of counsel for his defense." Citing
16 *Schlesinger* 335 F. Supp.2d at 381. Included in that right is
17 "the right to be represented by an attorney who is free from
18 conflicts of interest," citing *United States v. Perez*, 325 F.3d
19 115 at 125, Second Circuit 2003. Quote, "A defendant has
20 suffered ineffective assistance of counsel in violation of the
21 Sixth Amendment if his attorney has, one, a potential conflict
22 of interest that resulted in prejudice to the defendant or,
23 two, an actual conflict of interest that adversely effected the
24 attorney's performance," close quote. Citing *United States v.*
25 *Levy*, 25 F.3d 146 at 152 ,Second Circuit 1994. Where, as here,

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1 a court learns of a possible conflict of interest, it must,
2 quote, "investigate the facts and details of the attorney's
3 interests to determine whether the attorney in fact suffers
4 from an actual conflict, a potential conflict or no genuine
5 conflict at all at," *Id* at 153. "An attorney has an actual, as
6 opposed to at potential conflict of interest when, during the
7 course of the representation, the attorney's and defendant's
8 interests diverge with respect to a material, factual or legal
9 issue or to a course of action," citing *Perez* 325 F.3d at 125.
10 Quote, "An attorney has a potential conflict of interest if the
11 interests of the defendant may place the attorney under
12 inconsistent duties at some time in the future." And limited
13 circumstances where the defendant's lawyer was, one, unlicensed
14 or, two, had engaged in the defendant's crimes, a per se rule
15 applies wherein an actual conflict is presumed and the
16 defendant is relieved of the obligation to show that the
17 attorney's conflicts had adverse effects on the attorney's
18 performance, citing *Levy* 25 F.3d at 157.

19 Where the district court determines that the attorney
20 has an actual or potential conflict of interest, it must next
21 determine whether the conflict is disqualifying or waivable, *Id*
22 at 153. Quote, "If the court discovers that the attorney
23 suffers from a severe conflict such that no rational defendant
24 would knowingly and intelligently desire the conflicted
25 lawyer's representation, the Court is obliged to disqualify the

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1 attorney," end quote. "If the Court determines that the
2 attorney suffers from a lesser [actual] or only a potential
3 conflict, then it may accept a defendant's knowing and
4 intelligent waiver of his right to conflict-free counsel and
5 permit the defendant to be represented by the attorney of his
6 choice," citing *Perez*, 325 F.3d at 125. Where, as here, an
7 attorney has some involvement in or connection with acts that
8 serve as the basis for charges against a defendant, the
9 attorney's "performance as an advocate can be impaired by his
10 relationship to the events in question. For example, the
11 attorney may be constrained from making certain arguments on
12 behalf of his client because of his own involvement or may be
13 tempted to minimize his own conduct at the expense of his
14 client," citing *Locasio* 6 F.3d 933 to 934, see also *Schlesinger*
15 335 F. Supp. 2d at 382 and 384 (disqualifying defense lawyer
16 noting that counsel might "have a personal interest in
17 protecting his reputation" that could "influence [him] to
18 pursue certain representational tactics that favor his own
19 personal interest or that of his firm, impeding his ability to
20 effectively represent" the defendant. Noting that counsel
21 might "have an incentive to minimize his own involvement in the
22 alleged criminal activity so that he or other members of his
23 firm are not called as actual witnesses in this case.")

24 District courts "retain discretion to reject knowing
25 and intelligent waiver when his attorney's conflict jeopardizes

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1 the integrity of judicial proceedings. But absent such
2 institutional concerns, courts will not assume too
3 paternalistic an attitude in protecting the defendant from
4 himself [because] the choice remains his," Id at 125 through
5 126. Indeed, there remains a "presumption in favor of
6 [representation by a defendant's] counsel of choice," citing
7 *United States v. Jones*, 381 F.3d 114 and 119, Second Circuit
8 2004.

9 As I have noted, the government states that there is
10 no reason to believe that Mr. Griffin has any criminal
11 exposure, nor is there any allegation that he is unlicensed.
12 Accordingly, there is no per se conflict of interest, but there
13 is a risk that Mr. Griffin may seek to distance himself of
14 allegations of his client's fraud and obstruction of justice at
15 trial. And if Mr. Griffin continues as defense counsel, there
16 is the issue about him appearing either as a witness or unsworn
17 witness at trial as to his interactions with restaurant two's
18 lawyer. Accordingly, it is necessary for me to make sure that
19 Mr. Finkelstein understands the risks and problems associated
20 with continuing with Mr. Griffin as his lawyer. I will
21 therefore proceed with a *Curcio* hearing to determine whether
22 Mr. Finkelstein is prepared to knowingly and intelligently
23 waive his right to conflict-free representation.

24 Mr. Finkelstein, I will begin with some questions
25 concerning your background as well as your competence to

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1 consider the conflict of interest issues.

2 How old are you, Mr. Finkelstein?

3 THE DEFENDANT: Sixty-six, your Honor.

4 THE COURT: And what is your education?

5 THE DEFENDANT: My highest level of education was law
6 school, I graduated in '86.

7 THE COURT: What is your area of practice?

8 THE DEFENDANT: Predominantly personal injury and some
9 commercial work, in addition to the ADA.

10 THE COURT: And so you are a litigator?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: You said you graduated in 1986, and so
13 should I assume that you have been in practice for something on
14 the order of 35 years?

15 THE DEFENDANT: I was admitted December 13th of 1989,
16 your Honor.

17 THE COURT: So more like 32 years?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: I have to ask you some questions that go
20 to your mental competence. Have you ever been addicted to any
21 drugs or alcohol or been treated for any addiction?

22 THE DEFENDANT: No, your Honor, never.

23 THE COURT: Are you now or have you recently been
24 under the care of any kind of doctor?

25 THE DEFENDANT: Other than a general practitioner, no.

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1 THE COURT: In the past 24 hours, have you taken any
2 drugs, medicine, pills or drunk any alcohol?

3 THE DEFENDANT: No, your Honor.

4 THE COURT: And is your mind clear today, and do you
5 understand what is happening?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Now, you are currently represented by
8 Mr. Griffin?

9 THE DEFENDANT: Yes, your Honor.

10 THE COURT: And you retained him to represent you?

11 THE DEFENDANT: Yes, your Honor.

12 THE COURT: Are you satisfied with Mr. Griffin's
13 representation up to this point?

14 THE DEFENDANT: Yes, your Honor.

15 THE COURT: Mr. Finkelstein, have you retained or had
16 counsel appointed for you in any prior criminal matter?

17 THE DEFENDANT: Say that again. I didn't hear that,
18 Judge, I'm sorry.

19 THE COURT: I asked whether you have yourself retained
20 or had counsel appointed to represent you in connection with
21 another criminal matter?

22 THE DEFENDANT: No, your Honor. Not that I know of,
23 no.

24 THE COURT: You should understand that you have a
25 right to be represented by an attorney who does not suffer from

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1 any conflict of interest and has undivided loyalty to you.

2 Do you understand that you have that right?

3 THE DEFENDANT: Yes, I do, your Honor.

4 THE COURT: You should understand that being
5 represented by a lawyer who has a conflict of interest presents
6 certain risks to you. I'm going to discuss with you this
7 afternoon some of those risks. But it's impossible to predict
8 all the risks that a client might face when being represented
9 by a lawyer who has a conflict of interest. Do you understand
10 that?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Have you discussed with Mr. Griffin this
13 issue about conflict of interest?

14 THE DEFENDANT: Numerous times, your Honor. The last
15 time was about two weeks ago.

16 THE COURT: And have you and Mr. Griffin talked about
17 the fact that he might have firsthand knowledge of certain
18 facts that might be relevant to whether you are guilty of the
19 fraud and obstruction of justice charges against you?

20 THE DEFENDANT: Your Honor, based upon the letter that
21 I saw from the US attorney's office and my conversations with
22 Mr. Griffin, those documents were --

23 MR. GRIFFIN: May I just have one moment, Judge.

24 THE COURT: Yes.

25 (Conferring.)

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1 THE COURT: Let me repeat the question.

2 THE DEFENDANT: Thank you.

3 THE COURT: So my question was whether you and
4 Mr. Griffin have talked about the fact that he might have
5 firsthand knowledge of certain facts that might be relevant to
6 whether you are guilty of the fraud and obstruction charges
7 against you?

8 THE DEFENDANT: We absolutely did have numerous
9 conversations. Yes, your Honor.

10 THE COURT: Now, here, the government says that
11 Mr. Griffin has firsthand knowledge of efforts that you
12 allegedly made to cancel a hearing regarding a lawsuit you had
13 filed against a restaurant that I have referred to as
14 restaurant two, which alleged violations of the American's with
15 Disabilities Act. Do you understand the government has
16 asserted that Mr. Griffin has firsthand knowledge?

17 THE DEFENDANT: Yes.

18 THE COURT: Now, you have heard what I said today
19 about the case law and ethical rules that do not permit a
20 lawyer to become a witness in a trial, whether sworn or
21 unsworn, you heard me recount the law and the professional
22 rules on that point; right?

23 THE DEFENDANT: Heard all of it, yes, your Honor.

24 THE COURT: So if Mr. Griffin does represent you at
25 trial, I cannot permit him to be either a sworn witness -- that

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1 is, someone who is called to the witness stand -- or an unsworn
2 witness, which is to say, someone that appears in front of a
3 jury and makes personal assertions based on his personal
4 involvement in the underlying facts.

5 You understand I can't permit that to happen?

6 THE DEFENDANT: Yes, I do, your Honor.

7 THE COURT: Now, it's important that you understand
8 that one of the reasons that I can't warn you about all the
9 possible risks here is that I don't myself have personal
10 knowledge about the facts. But what I can say to you is that
11 you need to consider whether Mr. Griffin has knowledge of facts
12 that could be helpful to you if he were able to testify at the
13 trial. And you are much better situated to know the answer to
14 that question than I am.

15 Mr. Griffin has represented that he was nothing more
16 than a conduit for information and documents that were passed
17 on to restaurant two's lawyer. And if that is true and he's
18 just simply a conduit of information, then perhaps he doesn't
19 have information that could be helpful to you if he were called
20 to testify at the trial. But I don't know what Mr. Griffin's
21 role was. I only know what the parties have told me. And I
22 don't know what Mr. Griffin's personal interactions were with
23 the lawyer representing this restaurant. I don't know. So all
24 I can do is alert you to the possibility that if you think
25 Mr. Griffin has information that it would be useful to you to

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1 have testified to from the witness stand, you need to
2 understand that if he remains as your lawyer, I can't allow him
3 to testify.

4 Do you understand that?

5 THE DEFENDANT: Yes, your Honor. Yes. And I agree
6 with his statement that he was simply a conduit for the
7 information, yes.

8 THE COURT: And you understand also that I can't
9 permit Mr. Griffin to be an unsworn witness in the case, in the
10 sense that, suppose restaurant two's lawyer testifies from the
11 stand, I can't have Mr. Griffin inserting himself into the
12 cross-examination by saying things like, well, that's not what
13 you told me or that's not the way I remember it, et cetera, et
14 cetera. I can't do that, because then he's operating as an
15 unsworn witness. He's essentially testifying in front of a
16 jury, he's not under oath, and that's just not fair.

17 You understand that?

18 THE DEFENDANT: Yes, sir. I do, your Honor.

19 THE COURT: Now, as I suggested a moment ago, there is
20 a possibility that because of Mr. Griffin's contact with
21 restaurant two's lawyer, that might cause him, either
22 consciously or subconsciously, to limit or hinder certain
23 things he otherwise would do; steps, actions or arguments he
24 otherwise might make or take on your behalf. And it could
25 affect the advice he might otherwise give you. And one example

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1 of this would be the possibility that Mr. Griffin might be less
2 likely to recommend arguing that you relied on his advice when
3 responding to the allegations of fraud or it's possible that he
4 might take steps to distance himself from your conduct, for
5 example, in connection with restaurant two's lawyer.

6 Do you understand there is that possibility?

7 THE DEFENDANT: Yes, your Honor. I have no concerns
8 about it.

9 THE COURT: Mr. Griffin's personal involvement might
10 also, consciously or subconsciously, affect the types of
11 questions that he asks witnesses, including restaurant two's
12 lawyer.

13 Do you understand that there is that possibility?

14 THE DEFENDANT: Yes, sir, I do.

15 THE COURT: Mr. Griffin's personal involvement might
16 also impact the advice he gives you about whether to plead
17 guilty or to go to trial, either consciously or subconsciously.

18 You understand there is that possibility?

19 THE DEFENDANT: Yes, your Honor. I'm not concerned.

20 THE COURT: Now, as I have tried to make clear, these
21 are only examples of how it's possible that Mr. Griffin's
22 advice to you might be affected by his personal involvement.
23 As I have said, we cannot predict every way that Mr. Griffin's
24 personal involvement in this case might affect his
25 representation of you.

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1 Do you understand that?

2 THE DEFENDANT: Yes, your Honor.

3 THE COURT: Mr. Finkelstein, do you have any questions
4 for me about this conflict of interest issue?

5 THE DEFENDANT: No, your Honor.

6 THE COURT: So you have an important decision to make
7 in deciding whether you want to proceed with Mr. Griffin as
8 your lawyer. I'm going to ask you to take some time to think
9 about it. I urge you to speak with another lawyer about this
10 conflict of interest issue, a lawyer with expertise in criminal
11 law. I will schedule another conference about 30 days out to
12 discuss whether the disqualification issue has been resolved
13 and to determine whether you wish to proceed with Mr. Griffin
14 as your counsel. If so, I will have some more questions for
15 you at that time.

16 Now, let me give the lawyers an opportunity to say
17 anything they want either about the disqualification issue or
18 the conflict of interest issue. Is there anything the
19 government wishes to add?

20 MS. BHASKARAN: Not at this time, your Honor.

21 THE COURT: Mr. Griffin, anything else you want to say
22 on those two subjects?

23 MR. GRIFFIN: No, thank you. Judge, you have covered
24 it.

25 THE COURT: Let me inquire of the government, where

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1 are we in terms of discovery in this case?

2 MS. BHASKARAN: Certainly, your Honor, the government
3 has already started to produce discovery to the defendant.
4 Last week, we made one substantial production. I would say
5 that the discovery in this matter is on the more voluminous
6 side of the spectrum, in part because the government seized
7 several email accounts and electronic devices with potentially
8 responsive material on it. I'd note, for context, that the far
9 majority of those email accounts and devices were devices that
10 were seized from the defendant. We've been in discussions with
11 Mr. Griffin about producing and providing all this material to
12 the defendant. Once we receive a hard drive, we'll be in a
13 position to provide many of the email accounts in their
14 entirety, as well as the electronic devices.

15 In addition, with respect to our responsive review,
16 we've completed the responsive review of the email accounts,
17 and we're in the process of working with our vendor to get that
18 material to the defendant. I expect that he'll probably have
19 that, assuming we get the hard drive, within the next week or
20 so. With respect to the responsiveness review for the devices,
21 that review is ongoing. It's a little bit more cumbersome
22 because all of those materials have to go through a filter team
23 before they can be released to the prosecution team. In an
24 effort to move this case along expeditiously, given the amount
25 of time that it's been pending, I've had discussions with

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1 Mr. Griffin to see whether there's a way that we can streamline
2 some of the privilege review by, for example, a limited waiver
3 of attorney work product so that the government can quickly
4 identify any responsive material from the electronic devices.
5 With that said, it is our hope that we should complete our
6 responsiveness review for the electronic devices within the
7 next two or three months. But having said that, the entirety
8 of those devices, except for one, will be soon provided to the
9 defendant in its entirety.

10 THE COURT: So at the conference we're going to have
11 in about 30 days, we'll get an update on where the parties are
12 in terms of discovery.

13 Mike, we're looking for another date, approximately 30
14 days out.

15 THE DEPUTY CLERK: June 11th at 10:00 a.m. is
16 available, your Honor, which is a Friday.

17 THE DEFENDANT: I'm out of town.

18 THE DEPUTY CLERK: I understand you're out of town?

19 THE DEFENDANT: Yes, yes. The week after would be
20 great, week or two.

21 THE DEPUTY CLERK: The following Friday, the 18th at
22 10:00 a.m.

23 THE COURT: Is that okay with everybody, June 18th,
24 10:00 a.m?

25 MR. GRIFFIN: Yes, your Honor.

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1 Mr. Finkelstein does reside in Florida. Would the
2 Court allow the proceeding to be virtual, this way he doesn't
3 have to fly up and go through the process of that again?

4 THE COURT: I understand that, but I will tell you
5 that until we resolve the issue of representation, I'm very
6 uncomfortable doing it remotely. Certainly, for purposes of
7 scheduling conferences that we might have down the road, I
8 don't think it's necessary for Mr. Finkelstein to fly up here
9 every time.

10 THE DEFENDANT: Thank you.

11 THE COURT: But until we sort out this issue of
12 representation, I want to be able to see him face to face and
13 talk through these issues, so my hope is that when we're
14 together on June 18th, the issue will be resolved then. But
15 until it's resolved, I want the conferences to be face to face.

16 MR. GRIFFIN: We understand, Judge, certainly.

17 MS. BHASKARAN: Your Honor, with apologies, I
18 personally will be out of town on the 18th, and I'm the sole
19 assistant on this case. I'm available early that week on the
20 Monday or Tuesday or any time the week after.

21 THE COURT: How are we that Monday or Tuesday? Is the
22 15th available?

23 THE DEPUTY CLERK: The 15th, 10:00 a.m. is available.

24 THE COURT: Is that okay with everybody? I don't have
25 a calendar in front of me.

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1 THE DEFENDANT: Your Honor, the 16th?

2 MS. BHASKARAN: Again, with apologies, I will be out
3 of town the 16th, 17th and 18th.

4 THE COURT: I guess we're looking at the following
5 week, then.

6 THE DEPUTY CLERK: 22nd, 11:00 a.m.

7 THE COURT: How is that for the government, June 22nd,
8 11:00 a.m.?

9 MS. BHASKARAN: That works for the government, your
10 Honor.

11 MR. GRIFFIN: That works for the defense.

12 THE COURT: So we will have our next conference
13 June 22nd at 11:00 a.m.

14 Does the government wish for me to exclude time
15 between then and now?

16 MS. BHASKARAN: Yes, your Honor, to permit the defense
17 to begin to review the discovery and to allow the defense to
18 resolve the outstanding issue with respect to Mr. Griffin's
19 representation in this matter.

20 THE COURT: Any objection, Mr. Griffin?

21 MR. GRIFFIN: None, Judge.

22 THE COURT: I will exclude time between today and
23 June 22nd, 2021 under the Speedy Trial Act pursuant to Title 18
24 United States Code §3161(h)(7)(A) to permit the government to
25 make discovery and for the defendant to begin preliminary

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1 review and also for purposes of working out the representation
2 issues that we've discussed today. I do find that the ends of
3 justice served by granting this continuance outweigh the best
4 interests of the public and the defendant in a speedy trial.

5 Is there anything else from the government?

6 MS. BHASKARAN: Yes, your Honor, very briefly. The
7 government had submitted a protective order to govern discovery
8 in this matter. It has not yet been entered by the Court, and
9 we started to produce discovery, but we would appreciate the
10 Court's consideration of that order.

11 THE COURT: Mr. Griffin, did you have any objection to
12 the government's proposed protective order?

13 MR. GRIFFIN: No. I went over it with
14 Mr. Finkelstein, and we sent back to the government a response
15 that we approved.

16 THE COURT: Ms. Bhaskaran, we will find that proposed
17 protective order and execute it.

18 MS. BHASKARAN: Thank you, your Honor.

19 MR. GRIFFIN: Judge, the other thing we had done --
20 and I don't want to trouble this Court -- we had asked when he
21 was arraigned, Mr. Finkelstein's daughter is graduating college
22 in Tallahassee, Florida, and believe it or not, he is limited
23 to the Southern District of Florida. So we had put forth a
24 letter to the magistrate court, we just didn't get a response.
25 The government does consent to him traveling. May I put that

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1 to your Honor now or would you like a letter from me?

2 THE COURT: I'm going to grant the application. The
3 easiest thing would be if you just sent me a one line letter
4 saying that, and I'll endorse it.

5 MR. GRIFFIN: Thank you, Judge. We appreciate that.

6 THE COURT: That will be the end of it.

7 THE DEFENDANT: Thank you, your Honor.

8 THE COURT: If there's nothing else. I wish you all a
9 good day.

10 (Adjourned)